

WEST VIRGINIA
SECRETARY OF STATE
KEN HECHLER
ADMINISTRATIVE LAW DIVISION

Form #1

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OFFICE OF WEST VIRGINIA
SECRETARY OF STATE

NOTICE OF PUBLIC HEARING ON A PROPOSED RULE

AGENCY: WV Air Pollution Control Commission TITLE NUMBER: 45CSR32

RULE TYPE: Legislative; CITE AUTHORITY WV Code §16-20-5

AMENDMENT TO AN EXISTING RULE: YES ___ NO X

IF YES, SERIES NUMBER OF RULE BEING AMENDED: _____

TITLE OF RULE BEING AMENDED: _____

IF NO, SERIES NUMBER OF NEW RULE BEING PROPOSED: 45CSR32

TITLE OF RULE BEING PROPOSED: Civil Penalties

DATE OF PUBLIC HEARING: August 5, 1992 TIME: 9:00 a.m.

LOCATION OF PUBLIC HEARING: Conference Room

WV Air Pollution Control Commission

1558 Washington Street, East

Charleston, WV 25311

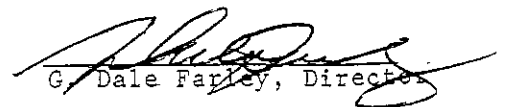
COMMENTS LIMITED TO: ORAL ___ , WRITTEN ___ , BOTH X

COMMENTS MAY ALSO BE MAILED TO THE FOLLOWING ADDRESS: Same as above.

The Department requests that persons wishing to make comments at the hearing make an effort to submit written comments in order to facilitate the review of these comments.

The issues to be heard shall be limited to the proposed rule.

ATTACH A **BRIEF** SUMMARY OF YOUR PROPOSAL


G. Dale Farley, Director

3.20

APPENDIX B

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FISCAL NOTE FOR PROPOSED RULES

OFFICE OF WEST VIRGINIA
SECRETARY OF STATE

Rule Title: 45CSR32 - "Civil Penalties"

Type of Rule: Legislative Interpretive Procedural

Agency: WV Air Pollution Control Comm. Address: 1558 Washington Street, East
Charleston, WV 25311

1. Effect of Proposed Rule	ANNUAL		FISCAL YEAR		
	Increase	Decrease	Current	Next	Thereafter
Estimated Total Cost	\$ -0-	\$ -0-	\$ -0-	\$ -0-	\$ -0-
Personal Services					
Current Expense					
Repairs and Alterations					
Equipment					
Other					

2. Explanation of above estimates:

Civil penalties are currently assessed by the Air Pollution Control Commission. The proposed legislative rule clarifies the amounts of penalties to be assessed. No additional personnel are necessary to implement this legislative rule.

3. Objectives of these rules:

The primary objective of this rule is to define serious and minor violations as required by the provisions of WV Code §16-20-8(a). The secondary objective of this rule is to provide standard criteria for the imposition of civil penalties.

4. Explanation of Overall Economic Impact of Proposed Rule.

A. Economic Impact on State Government.

None.

B. Economic Impact on Political Subdivisions; Specific Industries; Specific groups of citizens.

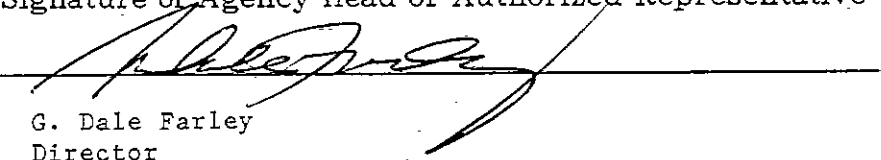
Minimal impact only on violators of air pollution control laws.

C. Economic Impact on Citizens/Public at Large.

None.

Date: June 3, 1992

Signature of Agency Head or Authorized Representative


G. Dale Farley
Director



West Virginia Department of
Commerce, Labor & Environmental Resources
Air Pollution Control Commission

1558 Washington Street, East
Charleston, West Virginia 25311

Telephone: (304)348-4022
or (304)348-3286
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SUMMARY

45CSR32 - "Civil Penalties" - is a new legislative rule proposed by the Air Pollution Control Commission in response to the newly enacted provisions of WV Code §16-20-8 (Effective March 7, 1992). The aforementioned Code provision provides, "The commission shall, by rule and regulation subject to the provisions of chapter twenty-nine-a of this Code, determine the definitions of serious and minor violations". The proposed legislative rule defines and clarifies serious violations and minor violations and provides a methodology and standards for calculating penalties.

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DEPARTMENT OF WEST VIRGINIA
SECRETARY OF STATE

45CSR32

TITLE 45
LEGISLATIVE RULES
AIR POLLUTION CONTROL COMMISSION

SERIES 32
CIVIL PENALTIES

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SECRETARY OF STATE

§45-32-1. General.

1.1. Scope. -- The West Virginia Air Pollution Control Commission hereby promulgates this legislative rule providing for the assessment of civil penalties for the violation of any provision of the Act, or for violation of any regulations issued pursuant to the Act, or for the violation of any order, agreement, or permit, or any part thereof, issued under the Act.

1.2. Authority. -- W. Va. Code §16-20-5.

1.3. Filing Date. --

1.4. Effective Date. --

§45-32-2. Definitions.

2.1. "Act" or "the Act" means the provisions of article twenty, chapter sixteen of the West Virginia Code, as amended. [§16-20-1, et seq.]

2.2. "Applicable Requirements" means all state, interstate compact, and federal standards and limitations for a source regulated pursuant to a legislative rule, including, but not limited to, emissions limitations, ambient air quality standards, standards of performance, control technology guidelines, and preconstruction review and any standard, term, condition, limitation or requirement contained in any order issued by the director or the commission including consent orders and permits.

2.3. "Commission" means the West Virginia Air Pollution Control Commission created pursuant to the provisions of article twenty, chapter sixteen of the West Virginia Code, as amended.

2.4. "Director" means the person appointed by the air pollution control commission to act as the director or the director's designated representative.

2.5. "Person" means any and all persons, natural or artificial, including the state of West Virginia or any other state, the United States of America, any municipal, statutory, public or private corporation organized or existing under the laws of this or any other state or country, and any firm, partnership, or association of whatever nature.

2.6. "Minor Violation" means the first violation of a specific provision of the Act, or rule or regulation promulgated under the Act, or any permit condition or limitation established pursuant to the Act, or a failure to comply with any final order of the director issued as provided in the Act that is the result of simple negligence, oversight or accident that is not considered serious by the director under the factors outlined below in subsection 2.7.

2.7. "Serious Violation" means (1) any second or subsequent violation of a specific provision of the Act, or rule or regulation promulgated under the Act, or any permit condition or limitation established pursuant to the Act, or a failure or refusal to comply with any final order of the director issued as provided in the Act or (2) any violation specifically designated as a serious violation in any rule or regulation of the commission or (3) any violation that the director determines is serious after evaluating the violator's culpability and the gravity of such violation as follows:

a. Gravity. The director shall consider and evaluate, where pertinent, and including, but not limited to, the following factors in determining the gravity of a violation:

A. Involvement of actual or threatened harm to the environment or the public health and safety;

B. Involvement of toxic or hazardous substances or potential long term effect of the violation;

C. The degree to which ambient or source-specific standards are exceeded, where pertinent;

D. The duration of the violation;

E. Program priorities, size of facility, or other pertinent factors;

F. Causes a violation of a national ambient air quality standard or a program, plan or an applicable requirement of the commission; and

G. Expenses or efforts by the commission in detecting, documenting, or responding to a violation.

b. Culpability. The director shall consider and evaluate, where pertinent, and include the following factors in determining the culpability of a violator:

A. The degree of intent or negligence;

B. Whether the case involves false reporting of required information or tampering with monitoring devices; and

C. Whether the violator has taken remedial measures or mitigated the harm caused by the violation.

c. Either the gravity of the violation or the culpability of the violator is sufficient to allow the director to determine that a violation is serious. Any one factor under either the gravity or culpability factors may be sufficient to allow the director to determine that the violation is serious.

d. The director shall determine that the following acts or conditions are serious regardless of the presence or absence of any other factors:

A. Any reckless, grossly negligent or willful violation.

B. Any violation that causes actual harm to humans, animals or the environment, regardless of whether those effects are short term or long term.

C. Whenever the degree to which ambient or source-specific standards are exceeded, where pertinent, by more than thirty percent (30%).

e. A condition that is caused by an act of God, a strike, a riot, a catastrophe, or a cause over which an alleged violator has no control is not considered a violation unless the alleged violator does not immediately report the condition and act promptly to mitigate or cure the condition.

2.8. "Risk of Harm" means the level of risk created by the likelihood of exposure, either individual or cumulative, or the actual damage, either individual or cumulative, to public health and the environment caused by a violation.

§45-32-3. Civil Penalty.

3.1. Any person violating any applicable requirement shall be liable for a civil penalty of not more than \$10,000.00 per day from the first day of the violation regardless of the date of issuance or receipt of the notice of violation, with the exception only of a minor first violation.

3.2. Each violation of any provision of the applicable requirements thereunder shall constitute a separate and distinct violation.

3.3. Each day during which the violation or failure continues shall be a separate violation.

3.4. The director shall first determine whether a violation is a minor first violation or is a serious violation. No civil penalty will be assessed or recovered for a minor first violation if the violation is corrected within the time specified in the notice of violation.

3.5. For purposes of determining the appropriate administrative penalty to be included in consent orders in compromise of potential civil penalties, each serious violation will be classified as a Class I, Class II, or Class III violation.

a. A Class I violation is a violation that was not the result of a reckless, grossly negligent, or intentional act by the alleged violator and is:

A. A minor violation, as defined in subsection 2.6 of this legislative rule, that is not corrected within the time specified in the notice of violation;

B. A violation that poses little or no risk of harm to the environment or the public health and safety; or

C. A violation of the applicable requirements for a construction or other permit because of the alleged violator's lack of knowledge, misunderstanding, or ignorance.

b. A Class II violation is a violation that was not the result of a reckless, grossly negligent, or intentional act by the alleged violator and that presents a moderate level of risk of harm to the environment or the public health and safety with either short term or long term effects.

c. A Class III violation is:

A. Any violation that poses a major risk of harm or that cause actual harm to the public health or the environment;

B. Any violation that is the result of a reckless, grossly negligent, or intentional act by the alleged violator; or

C. Violation of any compliance schedule contained in an order of the director or the commission.

3.6. The director shall determine the classification of each violation using the factors for gravity and/or culpability set forth in paragraphs 2.7.a and b.

3.7. The classification of the violation will determine the range of the administrative penalty to be assessed. The penalty for a Class I violation shall range from \$1,500.00 to \$5,000.00 per day for each violation. The penalty for a Class II violation shall range from \$2,000.00 to \$7,000.00 per day for each violation. The penalty for a Class III violation shall range from \$3,000.00 to \$10,000.00 per day for each violation.

3.8. In determining the appropriate administrative penalty to be included in consent orders in compromise for violations within each classification, the director shall consider any matters of record in mitigation or aggravation of penalty, including, but not limited to, the following factors:

a. The duration of the violation. The director shall consider the duration of the violation prior to the notice of violation or cease and desist order and the duration of the violation until compliance is achieved;

b. The gravity of the violation. The gravity of the violation shall be measured by the criteria set forth in 2.7.a of this legislative rule;

c. The strength or weakness of a judicial penalty action and application of judicial penalties;

d. Any economic benefit accrued by the violator because of delay in compliance with requirements. Economic benefit means the estimated net savings, net income or net gain realized by a person as a result of a violation. Economic benefit may include the estimated net income or net gain realized by a person through the use of facilities before all required permits are obtained. In determining economic benefit, the cost of achieving or returning to compliance and/or remediation shall be considered. In determining economic benefit, the director shall include interest, at a minimum of ten percent (10%) per annum, on the funds not expended that would have been necessary to timely comply with applicable requirements;

e. The amount of monetary penalty that will serve to deter further violations by the violator and to otherwise and in enhancing voluntary compliance with the applicable requirements by the violator and other persons similarly subject to the applicable requirements;

f. The history of past violations or failure to comply with applicable requirements including:

A. The number of past violations or failures;

B. The similarity of the most recent previous violation and the violation to be penalized;

C. The time elapsed since the last violation; and

D. The presence or absences of due diligence on the part of the violator in attempting to comply with the applicable requirements;

g. The degree of willfulness of the violation, culpability, defiance, or indifference to the applicable requirement;

h. That the noncompliance or violation and the surrounding circumstances were immediately reported to the director and whether the violation or noncompliance was concealed or there was an attempt to conceal by the person charged;

i. The economic and financial condition of the violator. A reduction to a Class I civil penalty may be considered if such a penalty would cause severe economic hardship to the violator;

j. The cost of enforcement, which means actual costs incurred after the person has been notified of the violation and may include sampling and analysis, evaluation of the person's property or facility, preparation of enforcement documents and acts, and similar costs;

k. That the violator has or is willing to employ extraordinary means to expeditiously correct the violation;

l. The number of previous violations and penalties that have been compromised, settled or judicially imposed;

m. That the violator offers to reduce or eliminate air pollution that is otherwise allowed pursuant to the applicable regulations and any permits that the violator holds; and

n. Other factors as justice may require, if the director specifically identifies the additional factors in the consent order.



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WEST VIRGINIA
AIR POLLUTION
CONTROL COMMISSION
GASTON CAPERTON
Governor

DEPARTMENT OF COMMERCE, LABOR & ENVIRONMENTAL RESOURCES
OFFICE OF THE SECRETARY
State Capitol, Room R-151
Charleston, West Virginia 25305-0310
Telephone: (304) 558-3255
Fax No.: (304) 558-4983

JOHN M. RANSON
Cabinet Secretary

June 5, 1992

G. Dale Farley, Director
Air Pollution Control Commission
1558 Washington Street, East
Charleston, West Virginia 25311

RE: Proposed Rules - Title 45, Series 32 (Civil Penalties)

Dear Dale:

Pursuant to West Virginia Code §5F-2-2(a)(12), I hereby consent to the proposal of the rules specified above.

You may attach a copy of this letter to your filing with the Secretary of State as evidence of my consent.

Sincerely yours,

John M. Ranson
John M. Ranson
Cabinet Secretary

JMR:cjb
B:RUL-APCC.CJB

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